THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

NO. 02-C-318

STEVEN COUTURE; LYNN COUTURE; CHARLES BLOUGH; LAWRENCE ANDERSON; TRACY BISSON; JOHN MCGOWAN; TAMMY MCGOWAN; TAMI HATCH; and
ARLIE HATCH for themselves and on behalf of all others similarly situated

V.

G.W.M., INC. d/b/a AUTO-TORIUM; WFS FINANCIAL, INC.; AMERICREDIT FINANCIAL SERVICES INC.; ARCADIA FINANCIAL LTD; LONG BEACH ACCEPTANCE CORP.; NORTHEAST CREDIT UNION; and
TRANSOUTH FINANCIAL CORPORATION

OPINION AND ORDER

LYNN, J.

The nine named plaintiffs bring this proposed class action to obtain redress for alleged deceptive practices engaged in by the defendants in connection with the financing of used cars purchased by them from defendant G.W.M., Inc., doing business as the Auto-torium (hereinafter "Auto-torium"). The other named defendants are six finance companies which took assignments from Auto-torium of automobile retail installment sales contracts executed by plaintiffs and putative members of the class. Presently before the court is plaintiffs' motion for class certification. After carefully

considering the voluminous filings submitted by the parties, I conclude that the motion must be denied.[1]

I.

For the purpose of ruling on class certification, I find the pertinent facts to be as follows. Auto-torium is a New Hampshire automobile dealer licensed under the provisions of RSA chapter 361-A (1995 and Supp. 2002). On July 19, 2001, plaintiffs Steven and Lynn Couture purchased a 1998 Ford Explorer from Auto-torium. To finance the purchase, the Coutures entered into a retail installment sales contract with Auto-torium (hereinafter "the first contract") containing a finance rate of 14.25% and a finance charge of $6,632.00. At the same time, Auto-torium also required the Coutures to execute a document entitled "Notice of Pre-Approval," which states that it is "attached to and made part of a motor vehicle retail sales finance contract." This document states:

NOTICE OF PRE-APPROVAL

THIS RIDER IS ATTACHED TO AND MADE PART OF A MOTOR VEHICLE RETAIL SALES FINANCE CONTRACT

DATE _____
BUYER'S NAME _____
VIN# _____
YEAR, MAKE, MODEL _____

IF GWM INC., DBA AUTO TORIUM IS UNABLE TO SECURE A BANK LOAN, WITHIN TWO (2) BANKING DAYS OF THIS DATE FOR SAID BUYER BECAUSE OF FALSE STATEMENTS: DELINQUENT CREDIT, INSUFFICIENT DOWN PAYMENT, THE LACK OF PROOF OF INCOME AND/OR ANY OTHER REASON LEADING TO A FINANCE TURNDOWN,

[1] Although one or more parties have requested a hearing on the motion for class certification, I see no reason to hold a hearing in this case. The parties have submitted extensive pleadings and exhibits in support of their respective positions on the class certification issues. I find that further oral presentation would not be helpful in ruling on the motion.

THE BUYER SHALL, WITHIN 24 HOURS, RETURN SAID VEHICLE TO AUTO-TORIUM.

IF THE BUYER DOES NOT RETURN SAID VEHICLE, AUTO-TORIUM MAY TAKE THE VEHICLE FROM ME, (REPOSSESSION) WITH OR WITHOUT COURT ORDER, TO TAKE THE VEHICLE, YOU CAN ENTER MY LAND AND/OR ANY GARAGE OR BUILDING WHERE THE VEHICLE IS LOCATED SO LONG AS IT IS DONE PEACEFULLY, AUTO-TORIUM AT THAT TIME, WILL RETURN BUYERS DEPOSIT LESS ANY MONEY RESULTING FROM REPAIR OF DAMAGE OCCURING TO SAID VEHICLE DURING THE BUYERS POSSESSION, AND THIS CONTRACT SHALL BE NULL AND VOID.

IT MAY BE NECESSARY FOR AUTO-TORIUM TO SECURE A BANK LOAN FOR YOU AT AN ALTERNATE SOURCE OTHER THAN THE LENDER ORIGINALLY INTENDED AT THE TIME YOU TOOK DELIVERY IT IS POSSIBLE, BUT NOT LIMITED TO THAT THE TERMS, INTEREST RATE, OR REQUIRED DOWN PAYMENT COULD CHANGE IF NECESSARY, YOU AGREE TO RETURN TO AUTO-TORIUM (WITHIN TWENTY-FOUR HOURS OF BEING NOTIFIED) AND EXECUTE ANY AND ALL DOCUMENTS REQUIRED BY THE LENDER THAT DID APPROVE YOUR LOAN.

BUYER'S SIGNATURE _____

CO-BUYER'S SIGNATURE _____

After the Coutures executed the retail installment contract and the Notice of Pre-Approval, Auto-torium took possession of the car the Coutures were trading-in, signed over the title papers to the Explorer, affixed temporary plates to that vehicle and issued a temporary registration, and gave the keys to the Coutures, who then drove the Explorer home.[2]

One week later, Auto-torium informed the Coutures they would need to rewrite the retail installment contract because financing had been denied. On July 28, 2001, the Coutures signed a second contract with Auto-torium (hereinafter "the second contract"), which was backdated to July 19, 2001, and which contained a higher

[2] The practice described in the text, whereby the buyer takes immediate possession of the vehicle he/she has purchased, is sometimes referred to as "spot delivery."

financing rate (17.99%) and finance charge ($8,230.00) than the first contract. The second contract was assigned to WFS and the Coutures have made monthly installment payments to WFS based upon the interest rate specified in the second contract.

Plaintiffs claim to have learned through discovery that from May 14, 1999, to the present, Auto-torium had over six hundred customers who signed a second retail installment sales contract containing a higher finance rate after the first contract was rejected by a lender. Plaintiffs allege that the practice of inducing customers to sign an initial contract the terms of which are not final and then requiring the customers to execute a second contract at a higher rate is typical of the way Auto-torium conducts its business.

The plaintiffs have moved to certify a class consisting of individuals similarly situated; they also propose six assignee subclasses -- one for each of the defendant assignees.[3] The proposed subclasses will be represented by the individual plaintiffs named above. Plaintiffs propose that the class be defined as all persons who bought a car from Auto-torium between May 14, 1999 and the present and who satisfy the following criteria:

> 1. Their file maintained by Auto-torium contains: a) a Notice of Pre-Approval signed by a class member; b) at least two retail installment contracts bearing the same date that contain different finance charge amounts; c) a loan approval notification form that bears a date subsequent to the date appearing on the retail installment contracts; d) a retail installment contract that identifies an assignee defendant which issued the loan approval notification form that discloses a higher finance charge than one or more of the other retail installment contracts in the file.

[3] The following are assignee subclasses proposed by plaintiffs: Americredit Assignee Subclass; Arcadia Assignee Subclass; Long Beach Assignee Subclass; Northeast Credit Union Assignee Subclass; Transouth Assignee Subclass; and WFS Assignee Subclass.

2. Their file maintained by the defendant assignee contains: a) documentation establishing that the retail installment contract was assigned to one of the defendant assignees; and b) the defendant assignee has received one or more payments on the contract.
3. Neither file contains: a) an arbitration agreement signed by a class member; or b) documentation establishing that: (i) the class member's contractual obligation is listed in a pending bankruptcy action or has been discharged in bankruptcy; or (ii) the defendant assignee has obtained a final judgment against the class member in an action arising out of the contract.

II.

The prerequisites for certification of a class action are set forth in Superior Court Rule 27-A. A class may be certified when:

> (1) The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> (2) There are questions of law or fact common to the class which predominate over any questions affecting only individual members;[4]
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (4) The representative parties will fairly and adequately protect the interests of the class;
> (5) A class action is superior to other available methods for the fair and efficient adjudication of the controversy; and
> (6) The attorney for the representative parties will adequately represent the interests of the class.

Since the provisions of Rule 27-A are substantially similar to Rule 23 of the Federal Rules of Civil Procedure, it is helpful to look to federal case law as an aid in construing the New Hampshire rule. See e.g. Royer v. State Dept. of Employment Security, 118 N.H. 673, 682-83 (Douglas, J., concurring). In moving for class certification, plaintiffs bear the burden of proving that each of the prerequisites for certification have been met. See Makuc v. American Honda Motor Co., 835 F.2d 389,

[4] Although Superior Court Rule 27-A is structured differently than Federal Rule 23, I disagree with plaintiffs' assertion that the state rule does not contain an explicit "predominance" requirement. The text of subsection (2) of Rule 27-A plainly does contain such a requirement.

394 (1st Cir. 1987). Although my role in ruling on class certification does not include deciding the merits of the case, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974), "a motion to certify generally involves considerations . . . enmeshed in the factual and legal issues comprising [a] plaintiff's causes of action." Mulligan v. Choice Mtg. Corp. USA, 1998 U.S. Dist. LEXIS 13248, *6 (D.N.H. 1998) (citations omitted). Thus, I "may formulate some prediction as to how specific issues will play out in order to determine whether class certification is appropriate." Waste Mgmt. Holdings Inc. v. Mowbray, 208 F.3d 288, 298 (1st. Cir. 2000). Because I conclude that plaintiffs have failed to satisfy the "predominance" test -- that is, they have not demonstrated that common questions of law or fact predominate over issues affecting individual car buyers -- I find it unnecessary to address the other criteria for class certification.

Under the predominance test, I must first ascertain whether there are questions common to the class. I must then determine "whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." A. Conte & H. Newberg, Newberg on Class Actions § 4.25, at 156 (4th ed. 2002). The focus of the predominance inquiry is to determine "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products Inc. v. Windsor, 521 U.S. 591, 594 (1997).

In determining whether common issues predominate with respect to plaintiffs' claims, I must examine RSA 361-A, the Retail Installment Sales of Motor Vehicles Act (the Act), and scrutinize the manner in which plaintiffs propose to prove their entitlement to relief under the Act. RSA 361-A requires that a retail installment sales contract for an indirect loan (such as the ones at issue here) must be complete as to "all essential

provisions," including a finance charge, prior to being signed by the car buyer. See RSA 361-A:7, :8 (Supp. 2002). The Act makes any purported waiver of its provisions unenforceable and void. RSA 361-A:12 (1995).

The plaintiffs contend that, through use of the Notice of Pre-Approval form, Auto-torium violated RSA 361-A by inducing customers to sign retail installment contracts that effectively contained an "open-ended" interest rate. Plaintiffs' position is premised on the thesis that the third paragraph of the Notice of Pre-Approval contractually obligated buyers to execute a new (second) installment sales contract containing a higher interest rate if Auto-torium was not able to obtain financing at the lower interest rate specified in the initial (first) contract. Therefore, plaintiffs contend that the common questions for the court's consideration are:

> 1) Whether Auto-torium violated RSA 361-A:7 by obtaining prohibited and unenforceable waivers from the plaintiffs and class members?
>
> 2) Whether Auto-torium violated RSA 361-A:7(I)(a) by having the plaintiffs and class members sign retail installment contracts that were not completed but that instead contained financing terms that were subject to future modification?

Pls.'s Case Management Plan, p. 1.

Plaintiffs rely on cases such as Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 39 (1st Cir. 2003) for the proposition that a class comprised of consumers who have signed a standard form contract will "almost certainly satisfy the predominance requirement." Under plaintiffs theory of liability, this case can likely be decided on summary judgment based on my determination of the legal effect of the third paragraph of the Notice of Pre-Approval form. If I accept plaintiffs' preferred argument – that this paragraph legally obligates a buyer to execute a second contract with a higher interest

rate than the first contract – then they have established a violation of RSA 361-A:7, I(a) and II(h) because the contract was not "completed as to all essential terms" and did not contain "the amount of the finance charge" when it was executed. On the other hand, if I find -- as defendants appear to concede for present purposes -- that the form is ambiguous as to whether the buyer is required to execute a second contract, that very ambiguity also constitutes a violation of the same provisions of RSA 361-A. Relying on cases decided under the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, plaintiffs contend that under either scenario the class will be entitled to relief on its statutory claim regardless of whether any individual car buyer believed he was required to sign a second contract. Thus, plaintiffs argue that I should reject defendants' position that the predominance test is not met because of the necessity of examining all the facts and circumstances, including extrinsic evidence beyond the written documents, involved in each separate transaction.

I am not persuaded by plaintiffs' assertion that resolution of this case will "require no more than the summary adjudication of a statutory violation." In my earlier ruling on the motions to dismiss, I concluded that the most sensible construction of the Notice of Pre-Approval form was that it does require the buyer to execute a second contract if Auto-torium cannot obtain financing at the initially-agreed rate (unless Auto-torium is unable to obtain financing at all). On further reflection, however, I find that, despite its poor draftsmanship and obvious ambiguity, the form also is reasonably susceptible to an alternative interpretation. Specifically, paragraph 1 of the Notice of Pre-Approval can be construed to mean that the buyer is entitled to rescind the contract whenever Auto-torium is unable to obtain financing at the agreed rate; and the "IT MAY BE

NECESSARY" and "IF NECESSARY" language found in paragraph 3 can be read to mean that the requirement to execute new contract documents comes into play only in the circumstance where new documents are "necessary" because the buyer has decided not to rescind the contract. Indeed, the record contains substantial evidence indicating that Auto-torium did not consider buyers bound by the terms of the original contract where the interest rate or finance charges originally agreed upon could not be obtained. Moreover, the discovery conducted thus far raises substantial questions as to whether any or all of the named plaintiffs actually believed they were legally obligated to sign new contracts at higher rates of interest.

This case is distinguishable from the TILA cases relied on by plaintiffs because the remedies provided under the TILA are significantly different than those available under RSA 361-A. It is true, as plaintiffs assert, that the consumer in a TILA action is not required to prove that he sustained actual damages as a result of the defendant's proscribed conduct. See Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 801-02 (6th Cir. 1996). But the reason actual damages are not a prerequisite to relief under TILA is that TILA specifically provides, as an alternative or supplement to actual damages, so-called "statutory damages" of twice the amount of the finance charge involved in the transaction (but, in the case of an individual action, not less than $100.00 nor more than $1,000.00; and, in the case of a class action, not more than the lesser of $500,000.00 or 1 percent of the net worth of the creditor). 15 U.S.C. § 1640(a)(2)(A), (B).

By contrast, the only provision of RSA 361-A which gives an aggrieved consumer the opportunity for a monetary recovery without regard to actual damages is RSA 361-A:11, III. This section states, in relevant part, that "[a]ny person violating the

provisions of RSA 361-A:7 or RSA 361-A:8 . . . shall be barred from recovering any finance charge, delinquency, or collection charge on the contract." (Emphasis added.) As noted in my ruling on the motion to dismiss, despite the use of the "shall be barred" language, I believe that this section does not merely create an affirmative defense against a creditor's attempt to collect; instead it affords a consumer who is a party to a transaction wherein the seller or creditor has violated RSA 361-A an affirmative right to recoup any finance, delinquency or collection charges already paid. However, because RSA 361-A:11, III limits the charges that may be recovered to those paid "on the contract," it necessarily requires a determination of what the parties to the transaction understood the terms of the contract to be. If, as the record strongly suggests may be the case with respect to the transactions of many of the putative class members, both Auto-torium and the buyer understood the contract to give the buyer a full right of rescission in the event the initially specified interest rate could not be obtained, then each of the transactions at issue really did involve two separate contracts. See Janikowski v. Lynch Ford, Inc., 210 F. 3d 765 (7th Cir. 2000). As to the first contract, no charges would be recoverable by the buyer because, by definition, that contract was rescinded and no interest was ever paid. And as to the second contract, no charges would be recoverable by the buyer because there was no failure to provide any required disclosures on that contract. Given the ambiguity of the Notice of Pre-Approval form, the intent of the parties will have to be determined, not as a matter of law, but as a matter of fact, on a case by case basis, from an examination of the writings, the extrinsic evidence and all the other circumstances surrounding each particular transaction. See Dillman v. New Hampshire College, ___ N.H. ___, No. 2003-109

(Dec. 30, 2003), slip op. at 2. These individual determinations clearly will predominate over any questions common to all members of the proposed class.

III.

For the reasons stated above, plaintiffs' motion for class certification is hereby denied.

BY THE COURT:

January 18, 2004

_____
Robert J. Lynn
Associate Justice